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WILEY, REIN & FIELDING

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1776 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 429-7000

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WRITER'S DIRECT DIAL NUMBER
(202) 429-7303

FACSIMILE
(202) 429-7049

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex parte Written Presentation
In MM Docket No. 92-265

Dear Mr. Caton:

Pursuant to Section 1.1206 of the Commission's rules, submitted herewith are two copies of a written ex parte presentation on behalf of Viacom International Inc. ("Viacom"), in response to previous ex parte written presentations by various parties in the above-captioned proceeding.

Copies of the ex parte presentation and this letter are being sent to the individuals listed on the following page. Please feel free to contact me if you have any questions.

Respectfully submitted,

Wayne D. Johnsen

Wayne D. Johnsen

WDJ/rg
Enclosure

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List ABCDE

Mr. William F. Caton
July 14, 1994
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cc: The Honorable James H. Quello
The Honorable Andrew C. Barrett
The Honorable Rachelle B. Chong
The Honorable Susan Ness
Maureen O'Connell
Lisa B. Smith
James R. Coltharp
Jill Lockett
Richard K. Welch
Rosalind K. Allen
Meredith Jones
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Washington, D.C. 20554

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OFFICE OF SECRETARY

In the Matter of)
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Implementation of Sections 12)
and 19 of the Cable Television)
Consumer Protection and)
Competition Act of 1992)
)
Development of Competition)
and Diversity in Video)
Programming Distribution and)
Carriage)

MM Docket No. 92-265

EX PARTE RESPONSE OF VIACOM INTERNATIONAL INC.

Richard E. Wiley
Lawrence W. Secrest, III
Philip V. Permut
Wayne D. Johnsen
of
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

Its Attorneys

July 14, 1994

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Development of Competition)
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Programming Distribution and)
Carriage)

To: The Commission

EX PARTE RESPONSE OF VIACOM INTERNATIONAL INC.

Viacom International Inc. ("Viacom"), by its attorneys, hereby responds to (i) the ex parte presentations of the National Rural Telecommunications Cooperative ("NRTC") dated November 19, 1993 (the "First NRTC Ex Parte Presentation") and March 4, 1994 (the "Second NRTC Ex Parte Presentation"); and (ii) the ex parte response of DirecTv, Inc. ("DirecTv"), dated May 26, 1994 (the "DirecTv Ex Parte Presentation") in the above-referenced proceeding. For the reasons set forth below, Viacom submits that Section 76.1002(c)(1) of the Commission's cable regulations correctly reflects Congressional intent to limit exclusive cable programming distribution arrangements. Accordingly, the requests by NRTC and DirecTv that the rule be extended on reconsideration to bar non-cable exclusives should be rejected.

I. Overview and Summary

In its First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359 (1993) (the "First Report and Order"), the Commission promulgated regulations implementing Section 628 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act" or the "Act").¹ Section 76.1002(c)(1) of those rules, which implements Section 628(c)(2)(C) of the Act, prohibits cable operators from entering into exclusive distribution arrangements with vertically integrated programmers that extend into areas that are not served by cable.² Viacom has supported the Commission's rule.

All three of the ex parte presentations referenced above address issues raised by NRTC in a petition for reconsideration urging the Commission to change the rule.³ The issue raised by NRTC in its petition for reconsideration is a narrow one -- whether Section 628(c)(2)(C) of the 1992 Cable Act prohibits not

¹ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

² 47 CFR § 76.1002(c)(1) (1993). Under Section 76.1002(c)(2) of the Commission's rules, a cable operator may enter into exclusive distribution arrangements with vertically integrated programmers in areas served by cable if the Commission first determines that the arrangement is in the public interest. Id. § 76.1002(c)(2) (1993).

³ Petition for Reconsideration of the National Rural Telecommunications Cooperative ("NRTC"), MM Docket No. 92-265 (June 10, 1993). Viacom filed an Opposition to NRTC's petition for reconsideration on July 14, 1993. Viacom Opposition to Petition for Reconsideration, MM Docket No. 92-265 (July 14, 1993).

only exclusive distribution arrangements between cable operators and vertically integrated programmers, as determined by the Commission, but also exclusive arrangements between vertically integrated programmers and multichannel video programming distributors ("MVPDs") other than cable operators ("non-cable distributors") that extend into areas unserved by cable. NRTC and DirecTv argue that such arrangements should be prohibited at all times and in all circumstances. DirecTv goes even further and requests a Commission determination that all exclusive contracts between vertically integrated programmers and non-cable distributors with respect to areas served by cable are presumptively disfavored under the law.

Viacom submits that the interpretations of the statute advanced by NRTC and DirecTv would stand the 1992 Cable Act on its head by placing cable operators, who were the principal targets of the 1992 Cable Act's program access requirements, in a more favorable position than non-cable distributors. The statute contains an express standard pursuant to which a cable operator may obtain exclusive rights within its service area, but has no parallel provision applicable to non-cable distributors. Accordingly, under the approach advocated by NRTC and DirecTv, non-cable distributors would be precluded altogether from entering into exclusive arrangements, whereas cable operators would be free to enter into such agreements within their service areas, subject to an appropriate public interest determination.

Contrary to the claims of NRTC and DirecTv, and as demonstrated more fully below and in Viacom's Opposition to NRTC's petition for reconsideration in this proceeding, exclusive distribution arrangements between vertically integrated programmers and non-cable distributors promote competition that furthers the policy goals of the 1992 Cable Act. Indeed, the very agreements between Viacom and United States Satellite Broadcasting Company, Inc. ("USSB") that are attacked by NRTC and DirecTv in their filings demonstrate the wisdom of the Congressional and Commission decisions to allow programmers to enter into exclusive arrangements with non-cable distributors.⁴ The Viacom/USSB agreements will fully preserve the opportunity for consumers throughout the United States to receive Viacom's program services via DBS technology. At the same time, they will help to prevent the creation of a DBS "monopoly in the sky" by enabling USSB to compete effectively against DirecTv, which otherwise could utilize its greater transponder capacity to crush its smaller rival.

⁴ It is Viacom's understanding that USSB also has entered into an exclusive arrangement with Time Warner Entertainment Company, L.P. regarding certain Time Warner program services. Those arrangements are also attacked by NRTC and DirecTv in their filings.

II. Viacom's Exclusive Agreements with USSB Will Allow USSB to Compete Effectively With Other DBS Distributors and Cable Operators and Will Benefit Consumers by Increasing the Diversity of Programming Available From DBS Distributors

In their filings, NRTC and DirecTv argue that USSB's exclusive agreements with Viacom and other programmers will prevent NRTC and DirecTv from competing against USSB and, ultimately, will hobble the ability of DBS to provide competition to entrenched cable operators. Contrary to their claims, however, the agreements are fully consistent with the Commission's current position regarding exclusive arrangements with non-cable distributors, and serve to increase both competition and program diversity.

In order to appreciate fully the infirmities of the position advanced by NRTC and DirecTv, it is appropriate first to correct the fundamentally distorted portrayal of the DBS marketplace contained in their filings. Currently, two entities -- USSB and DirecTv, a subsidiary of Hughes Communications Galaxy, Inc. ("Hughes") -- have commenced DBS operation. As a result of its superior transponder capacity, DirecTv ultimately will be able to provide consumers with up to 150 channels of programming. USSB, on the other hand, will be able to provide consumers only approximately 30 channels of programming because of its more limited transponder capacity. Between them, however, DirecTv and USSB will be able to provide the DBS consumer with essentially all of the programming available to cable subscribers. Indeed,

with approximately 180 channels of programming available from DirecTv and USSB, DBS consumers will have access to substantially more program options than are currently available to the vast majority of cable subscribers.

In developing its business plan, USSB recognized that its limited transponder capacity placed it at a severe competitive disadvantage with respect to DirecTv. Indeed, DirecTv will have de facto exclusivity for much of its programming -- regardless of what determination the FCC makes in response to the NRTC petition for reconsideration -- because USSB simply cannot match the sheer number of services that can be offered by DirecTv. USSB concluded that to be a viable DBS competitor it would need to differentiate its program offerings from those of DirecTv. Accordingly, USSB entered into exclusive DBS distribution arrangements with Viacom for the delivery of several of Viacom's program services.⁵ The arrangements allow USSB to attract customers by offering programming that is differentiated from that available from DirecTv, thereby helping USSB to become a viable DBS distributor. For Viacom, the exclusive arrangements guarantee that its program services will be marketed aggressively

⁵ It should be noted that Viacom's arrangements with USSB are exclusive only with respect to DBS and are themselves subject to the consent decree that Viacom entered into in 1993 (the "Viacom Decree"), at the same time the Primestar Partners entered into their own decree. The Viacom Decree essentially provides that Viacom programming will be made available to DBS subscribers from each DBS orbital slot, thus ensuring that exclusive arrangements are not used to limit competition.

to DBS customers.⁶ But most important, Viacom's exclusive arrangements with USSB help to ensure that there will be at least two viable competitors in DBS at the 101° orbital slot. In the absence of USSB's exclusive arrangements, there can be no assurance that there will be any competitor in DBS to Hughes's DirecTv.

The Viacom/USSB arrangements will be equally beneficial for consumers. First, it must be stressed that all DBS consumers throughout the country will have access to Viacom programming via USSB's system. In addition, by helping USSB to become a viable DBS distributor, Viacom's exclusive arrangements will help to ensure that DBS consumers have a choice between DBS distributors. The approach urged by DirecTv and NRTC, however, would effectively prevent USSB from offering a distinctive service in competition with DirecTv. Given Hughes' majority ownership of the DBS transmission system (the DBS satellites) and resulting control over the selection and distribution of program services, the likely consequence of the NRTC/DirecTv approach would be a concentration of power in DBS like that existing in cable.⁷ Such

⁶ The Commission has acknowledged that exclusive arrangements create incentives for distributors to aggressively promote and sell a particular service. New England Cable News, FCC 94-133, ¶ 33 (rel. June 1, 1994) ("New England Cable News").

⁷ Indeed, a DBS monopolist could well exert more monopoly power than a cable operator because a DBS distributor's "bottleneck" control would extend nationwide, while even the largest cable operator serves approximately 27% of cable subscribers nationally.

a "monopoly in the sky" would harm both consumers desiring DBS service and programmers dependent on distributors for delivery of their program services to consumers.

DirectVt claims that the benefits afforded by the exclusive distribution arrangements are outweighed by the "economies of 'one-stop shopping.'" DirectVt Ex Parte Presentation at 11. Contrary to DirectVt's assertions, however, there is nothing to preclude the establishment of agents authorized to sell the program services of both distributors, if the distributors deem such a practice to be in their best business interests. Indeed, this is the pattern that has developed in the TVRO market. Furthermore, an existing agreement between USSB and Hughes to utilize the Digital Satellite System receive system⁸ enables consumers to use the same equipment to obtain programming from both USSB and DirectVt. Thus, the convenience of one-stop shopping is by no means precluded by Viacom's exclusive distribution arrangements.⁹ Further, DirectVt has provided no evidence to support its contention that a consumer subscribing to both DirectVt's and USSB's DBS services will "almost certainly" pay more than if the consumer were able to buy a comprehensive

⁸ See USSB's Ex Parte Response to Ex Parte Presentation by the National Rural Telecommunications Cooperative, MM Docket No. 92-265, at 6 (Jan. 24, 1994) ("USSB Response").

⁹ In that connection, DirectVt's President has stated publicly that DirectVt intends to work with USSB to make it easy for the consumer to order services from each distributor. DirectVt and the NRTC: Partners in Rural America, TVRO Magazine, June 1994, at 25.

package available from one DBS distributor. DirecTv Ex Parte Presentation at 11. USSB and DirecTv already have announced the prices for their services. See USSB Ex Parte Presentation in MM Docket No. 92-265 (Apr. 25, 1994). A subscriber purchasing the most expensive package from each of USSB and DirecTv would pay less than \$65 to obtain HBO, Showtime, The Movie Channel, Cinemax, FLIX, The Disney Channel, Encore and more than 35 advertiser-supported satellite services. A review of prices from several cable operators throughout the country indicates that a subscriber purchasing a comparable package of program services would pay well in excess of that amount. See Attachment A. Moreover, DirecTv has made no claim that the price to subscribers would be lower if it were able to offer a comprehensive package of the same services. Indeed, contrary to DirecTv's unsupported statement, subscribers in the TVRO market (who often subscribe to the packaged offerings of several distributors) generally pay less in the aggregate to obtain a variety of program services from multiple sources than a cable subscriber receiving a comparable package from a single source.¹⁰

¹⁰ For example, a TVRO subscriber can obtain a program package containing twenty-seven advertiser-supported (or "basic") program services and three premium services from Showtime Satellite Networks and a package containing three additional premium services from NRTC-Steuben Rural TV for a total of \$56 per month. (In addition, the TVRO owner can receive approximately 75 channels of programming "in-the-clear" for no cost. See Comments of the Satellite Broadcasting and Communications Association of America in CS Docket No. 94-48, filed June 29, 1994.) A cable subscriber living in San Diego, (continued...)

Even if DirecTV were able to distribute the Viacom program services along with USSB, there is no guarantee that DirecTV would price all of its services in a way that would promote competition. For example, there appears to be nothing in the FCC's regulations that would preclude DirecTV from maintaining a low price for program services also offered by USSB and charging consumers higher prices for other program services that USSB would be unable to provide because of its inherent transponder capacity limitations. If, as a result of DirecTV's implementation of this type of pricing scheme, USSB were unable to become a viable competitor, consumers would be left totally at the mercy of monopoly pricing by DirecTV. In sum, in the absence of exclusive programming arrangements, the disparity in transponder capacity and DirecTV's own exclusive arrangements (de facto and otherwise¹¹) would likely result in a situation where the only source of "one-stop shopping" would be DirecTV -- which could then exploit its advantage to monopolize the entire national DBS business and charge monopoly rents as a result.

¹⁰(...continued)

California, would pay approximately \$69 per month to obtain 25 advertiser-supported satellite program services and six premium services. See Attachment A for additional examples of cable rates.

¹¹ See infra note 14 (discussing DirecTV's existing exclusive arrangements with movie studios and non-vertically integrated program services.).

Notwithstanding the generally acknowledged benefits of exclusive arrangements,¹² DirecTV claims that the driving force behind the USSB agreements is a desire by cable operators to "fragment the emerging DBS market and to substantially weaken DBS competitors" or to "impede the competitive development of the DBS industry." DirecTV Ex Parte Presentation at 5, 10. DirecTV's idea of a "non-fragmented" DBS market, however, is apparently a market with only one viable DBS distributor. As explained above, the exclusive arrangements at issue help to create competition in that market by preventing the establishment of a DBS distribution monopoly -- a result that would harm both consumers and programmers seeking distribution outlets for their program services.¹³

In an attempt to remove the focus from the pro-consumer benefits inherent in Viacom's USSB arrangements, DirecTV hypothesizes a scenario in which strategic application of the use of exclusive arrangements would allegedly render the program

¹² See, e.g., First Report and Order, 8 FCC Rcd at 3384.

¹³ Moreover, DirecTV and NRTC have failed to offer any legitimate rationale as to why Viacom would seek to "hobble" DBS. As demonstrated by Viacom in its petition for reconsideration in MM Docket No. 92-265, the harm to Viacom as a programmer that would result from the failure of alternative distribution technologies to emerge as viable competitors to cable far outweighs any potential benefits that would flow to Viacom from its cable operations. See Viacom Petition for Reconsideration and Clarification, MM Docket No. 92-265, at 7-8 (filed June 10, 1993). Rather, programmers such as Viacom have every incentive to ensure that there is vigorous competition in program distribution. Viacom's exclusive arrangements with USSB are designed to ensure that such competition will emerge.

access rules a nullity. Id. at 19. This, however, must be seen for what it is -- a scare tactic that is wholly removed from reality. For example, DirecTV claims that, under Viacom's approach, Viacom could just as easily enter into an exclusive distribution arrangement with Primestar, a DBS distributor controlled by a consortium of cable operators. Id. at 13. In fact, such a result is flatly prohibited by the Viacom Decree. Viacom Decree § IV(A)1.(j). Indeed, Viacom specifically negotiated with the state signatories to the Viacom Decree for the right not to have to sell its program services to Primestar or any other MSO-controlled entity -- even if Primestar or such other MSO-controlled entity were the only DBS distributor at a given orbital location. Viacom Decree § IV(A)1.(j)viii). If Viacom wanted to "hobble" DBS as an effective competitor to cable, Viacom surely would not have specifically negotiated for that right.

NRTC also asserts that the USSB/Viacom exclusive distribution arrangements will restrict program diversity. Thus, NRTC claims that "according to USSB [a] diversity of video programming sources is unimportant. A plethora of voices is unnecessary." Second NRTC Ex Parte Presentation at 22. NRTC, however, has it entirely backwards. USSB's position, supported by Viacom here, is that program diversity is essential and will in fact be promoted by permitting exclusive arrangements. It is NRTC's approach -- to preclude DBS exclusives -- that would have

the result of limiting program diversity in the DBS market because valuable DBS transponder capacity would be utilized to enable DirecTv to duplicate program offerings already available to DBS subscribers from USSB.¹⁴ Conversely, the USSB approach will expand program diversity and increase the "plethora of voices" available via DBS by permitting competitors to differentiate their program offerings and minimize such duplication.

In sum, contrary to the protestations of NRTC and DirecTv, the exclusive arrangements between Viacom and USSB will not hamper the viability of the DBS industry. Rather, they will serve to foster competition in the distribution of program services, to the ultimate benefit of consumers and programmers. Not only would the approach advocated by NRTC and DirecTv limit program diversity, but, by preventing USSB from being a viable competitor to DirecTv, the NRTC/DirecTv approach would recreate

¹⁴ Indeed, Viacom is perplexed about DirecTv's and NRTC's concern regarding USSB's exclusive arrangements. It is Viacom's understanding that DirecTv, for which NRTC will reportedly serve as the exclusive distributor in rural areas, has entered into exclusive arrangements for its pay-per-view movie offerings. These pay-per-view movie offerings will generally be made available to DBS consumers, via DirecTv's exclusive arrangements, substantially prior to the time at which the same movies will be made available over USSB's premium services. DirecTv also has entered into exclusive distribution arrangements with non-vertically integrated programmers. See DirecTv Ex Parte Presentation at 14-15. In any event, as discussed above, DirecTv's significantly greater transponder capacity will give it de facto exclusivity with respect to a large number of popular program services.

the very dangers that led to passage of the 1992 Cable Act, raising the specter of a cable-like, DBS "monopolist in the sky."

III. The 1992 Cable Act's Legislative History Supports the Commission's Conclusion That Non-Cable Exclusives Are Not Prohibited

In an attempt to support its reading of the statute, NRTC spends a large portion of its pleadings discussing Congressional intent with respect to exclusive arrangements between vertically integrated programmers and non-cable distributors. See, e.g., First NRTC Ex Parte Presentation at 4-5, 8-10; Second NRTC Ex Parte Presentation at 8-24. Significantly, the examples NRTC cites from the legislative history do not support its strained reading of Section 628(c)(2)(C). Indeed, those examples indicate that the harm Congress sought to address flowed from the grant of exclusive distribution rights to cable operators.¹⁵ They do not even remotely suggest that Congress was concerned about exclusive arrangements with non-cable distributors.

To the contrary, the legislative history indicates that the 1992 Cable Act was not designed to prohibit or restrict all exclusive arrangements, but only those in which cable operators are granted exclusive distribution rights -- the very type

¹⁵ As indicated by Home Box Office in its ex parte filing, the legislative history referenced in the NRTC filings deals with matters such as the market power of cable operators or non-cable distributors' support of the program access provision. See Ex Parte Response of Home Box Office to Ex Parte Presentations of the National Rural Telecommunications Cooperative, MM Docket No. 92-265, at 4-5 (Apr. 15, 1994).

precluded by the Commission in Section 76.1002(c) of its rules. For example, the Conference Committee Report accompanying the 1992 Cable Act clearly states that "the regulations required . . . prohibit exclusive contracts and other arrangements between a cable operator and a vendor . . ." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. at 92 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1274 ("Conference Report"). There simply is no evidence in the record that Congress was concerned about exclusive distribution arrangements with non-cable distributors or that the statutory provision was intended to have the broad scope advocated by NRTC and DirecTv.

Moreover, notwithstanding NRTC's claims, it is not "inconceivable" that Congress intended only to prohibit exclusive grants to cable operators in areas unserved by cable. As the Commission found in the First Report and Order cable operators had obtained exclusive distribution rights that prohibited the distribution of programming by others into areas unserved by cable.¹⁶ By preventing cable operators from entering into such arrangements, Congress ensured that consumers in all areas would be able to receive the same programming available to consumers with access to cable. There simply is no indication in the record that the exclusivity provisions of the 1992 Cable Act were designed to do more than this. On the contrary, the record is replete with references acknowledging the pro-competitive aspects

¹⁶ 8 FCC Rcd at 3378.

of exclusive arrangements. See, e.g., S. Rep. No. 92, 102d Cong., 1st Sess. 28 (1991), reprinted in 1992 U.S.C.C.A.N. 1133, 1161; 138 Cong. Rec. H6537 (daily ed. July 23, 1992) (statement of Cong. Schaeffer).

IV. NRTC's and DirecTv's Interpretation of the Program Access Provision Stands the 1992 Cable Act On Its Head By Placing Cable Operators in a More Favorable Regulatory Position than Non-Cable Distributors

As demonstrated above, Viacom's exclusive arrangements with USSB will enhance diversity and strengthen competition within the DBS market. Moreover, the legislative history supports the conclusion that the exclusivity provisions of Sections 628(c)(2)(C) and (D) were designed to limit the ability of vertically integrated programmers to enter into exclusive arrangements with cable operators, and not to preclude or otherwise limit exclusive arrangements with non-cable distributors. Thus, Section 76.1002(c)(1) of the Rules adopted by the Commission reflects Congressional intent and was appropriately crafted to implement the fundamental statutory objectives. Nevertheless, NRTC and DirecTv urge the Commission to reverse course and adopt a strained interpretation of the statute that, as shown below, would effectively place cable operators -- who exercise effective monopoly power -- in a more favored regulatory position than non-cable distributors.

The 1992 Cable Act was based, in large part, on Congressional findings that cable operators were able to exert

undue market power. See, e.g., 1992 Cable Act § 2(a)(2), 106 Stat. at 1460 ("Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power for the cable operator as compared to that of consumers and video programmers."). Because of that market power, Congress found that "cable operators have the incentive and ability to favor their affiliated programmers" and that "[v]ertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies." Id. § 2(a)(5), 106 Stat. at 1460.¹⁷

In light of these findings, one of the principal policy objectives underlying the 1992 Cable Act is to make available to the public a diversity of views and information by fostering the development of competing video programming distributors. Id. § 2(b)(1), 106 Stat. at 1463. Section 628 of the Act in particular was intended to encourage competition by DBS and other alternative MVPDs in order to lessen the market power of cable operators and to enhance diversity in the distribution of video programming. 1992 Cable Act § 19, 106 Stat. at 1494; see also Time Warner Cable, FCC 94-132, ¶ 23 (rel. June 1, 1994) ("Time

¹⁷ Based upon these findings, Congress made clear that the 1992 Cable Act was intended to ensure that cable operators do not continue to have undue market power vis-à-vis video programmers and consumers. Id. § 2(b)(5), 106 Stat. at 1463.

Warner Cable"). The provision also was designed to "extend[] programming to areas not served by cable." Conference Report at 92, reprinted in 1992 U.S.C.C.A.N. at 1275.

In construing the statute, the Commission must ensure that the regulations it adopts further these underlying Congressional goals and policies.¹⁸ The Commission already has determined that it was the "use of exclusive contracts between vertically integrated programming vendors and cable operators [that] served to inhibit the development of competition among distributors."¹⁹ As demonstrated above, however, Viacom's exclusive arrangements with USSB will enhance diversity and strengthen competition within the developing DBS marketplace. Thus, Viacom submits, the Commission correctly designed Section 76.1002(c)(1) to limit exclusive grants to cable operators, while not restricting exclusive grants to emerging MVPD competitors, who lack cable's market power. By contrast, and as explained below,²⁰ the interpretation of the statute urged upon the Commission by NRTC and DirecTV would lead to the absurd result of placing cable

¹⁸ It is a fundamental tenet of statutory construction that a statute must be construed in a manner that will achieve a harmonious result among its various sections. 2A Sutherland Stat. Const. § 46.05 (5th ed. 1992). Similarly, a result that runs counter to the intent of the overall legislation cannot be favored. Id. Thus, in construing any provision of the 1992 Cable Act, it is imperative that the Commission look to its overall structure and intent in order to ensure that the core policies underlying the Act are fulfilled.

¹⁹ Time Warner Cable ¶ 23.

²⁰ See discussion at pages 19-21, infra.

operators in a more favored regulatory position than competing non-cable distributors -- a result that simply cannot be reconciled with the purposes of the 1992 Cable Act.

DirectV and NRTC argue that exclusive contracts are prohibited, not only by the specific provisions of Sections 628(c)(2)(C) and (D), but also implicitly by the more general language of Sections 628(b) and 628(c)(2)(B). DirectV Ex Parte Presentation at 5-6; Second NRTC Ex Parte Presentation at 10.²¹ As an initial matter, the position advanced by NRTC and DirectV would effectively make the specific prohibition on exclusive grants to cable operators contained in subsection (C) superfluous. If the general language had been intended to prohibit all exclusives, as NRTC and DirectV argue, it would have been totally unnecessary to structure specific prohibitions

²¹ NRTC also raises the specious argument that, because a vertically integrated programmer must, by definition, also be a cable operator, Section 628(c)(2)(C) applies to any arrangement by which a vertically integrated programmer grants exclusive distribution rights. First NRTC Ex Parte Presentation at 9-10. The 1992 Cable Act, however, clearly and consistently distinguishes between a vertically integrated programmer as the grantor of distribution rights and the cable operator itself as the grantee of such rights. As demonstrated herein, the program access provisions are designed to prevent cable operators from obtaining grants of exclusive distribution rights that served to prevent consumers living in non-cabled areas from receiving vertically integrated programming. The Commission should reject out of hand NRTC's facile attempt to blur the grantor/grantee distinction contained in the 1992 Cable Act.

against a particular category of exclusives elsewhere in the statute.²²

The fact remains that the only specific restrictions on exclusive contracts in the program access provisions are found in Sections 628(c)(2)(C) and (D). Further, only exclusive grants to cable operators are discussed in those provisions of the statute. Thus, Viacom submits, the Commission correctly determined that the 1992 Cable Act's restrictions on exclusive contracts were directed at exclusive grants to cable operators, whose market power Congress sought to limit. The Commission properly crafted its implementing regulations to address that objective. Indeed, the "presumption" against all exclusives advocated by NRTC/DirectV is totally without support in any provision of the statute. Moreover, as demonstrated below, under the NRTC/DirectV approach, Sections 628(c)(2)(C) and (D) would operate in combination to place cable operators in a more advantageous regulatory position than non-cable distributors -- the intended beneficiaries of the Congressional plan.

Section 628(c)(2)(D) states that cable operators may enter into exclusive arrangements within their service areas if the Commission determines that the public interest would be served. Indeed, the Commission already has found that at least one cable-exclusive distribution arrangement serves the public interest.

²² A reading of the statute that results in a provision being superfluous is not favored. 2A Sutherland Stat. Const. § 46.05 (5th ed. 1992).

New England Cable News ¶ 53 (allowing New England Cable News to enter into exclusive distribution agreements with cable operators). By its terms, however, Section 628(c)(2)(D) applies only to cable operators. There simply is no parallel provision concerning exclusive arrangements with non-cable distributors. Accordingly, only cable operators are provided a mechanism under the statute to demonstrate that the public interest would be served by an exclusive distribution arrangement.

Thus, the end result of the NRTC/DirectV interpretation is that, although the FCC might allow a cable operator to obtain exclusivity within its service area, the Commission would lack the power to permit a grant of similar exclusive rights to a non-cable distributor, even if the Commission determined that such a grant would serve the public interest.²³ Under the NRTC/DirectV view of the statute, therefore, an MMDS operator seeking to compete with cable operators in the New England area would be prohibited from obtaining the same type of exclusive rights that the Commission has determined may be granted to cable operators.

²³ NRTC/DirectV must either acknowledge this illogical result or argue that Congress expressly required a public interest showing to be made by a cable operator in Section 628(c)(2)(D) and implicitly mandated the same showing for non-cable distributors elsewhere in the statute. There is no evidence in either the 1992 Cable Act itself or its legislative history, however, that the public interest standard applicable to cable operators was to be used to determine whether non-cable distributors could enter into exclusive arrangements as well. The absence of a parallel "safety valve" provision for non-cable exclusives provides compelling support for the Commission's determination, in adopting Section 76.1002(c)(1), that Congress did not intend to limit such arrangements.